

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

United States of America,

Plaintiff,

v.

Civil Case No. 04-40344
Criminal Case No. 00-50032

Audie Denver Wheeler,

Honorable Sean F. Cox

Defendant.

ORDER DENYING MOTION TO RECONSIDER ORDER
GRANTING CERTIFICATE OF APPEALABILITY

In this action Defendant Audie Denver Wheeler (“Wheeler”) was charged with conspiracy to distribute five kilograms or more of cocaine and 1,000 kilograms or more of marijuana in violation of 21 U.S.C. §§ 846 and 841(a)(1). Following a jury trial, Wheeler was found guilty of several counts.

On November 29, 2004, Wheeler filed a Motion to Vacate under 28 U.S.C. § 2255. (Docket Entry No. 196). In his § 2255 Motion, Wheeler raised five issues, identified as Issues I through V.

On August 26, 2005, Judge Gadola referred the § 2255 Motion to Magistrate Judge Wallace Capel, Jr. for a report and recommendation (“R&R”), pursuant to 28 U.S.C. § 636 (B)(1)(B). (Docket Entry No. 202). On November 14, 2005, Magistrate Judge Capel issued his R&R in which he recommended that Wheeler’s § 2255 Motion be denied. (Docket Entry No. 203). On April 28, 2006, Judge Gadola adopted Magistrate Judge Capel’s R&R and denied Wheeler’s § 2255 Motion. (Docket Entry No. 205).

On May 30, 2006, Wheeler filed a motion requesting a certificate of appealability.

(Docket Entry No. 211).

On December 5, 2006, Judge Gadola issued an “Order Granting in Part and Denying in Part Petitioner’s Motion for a Certificate of Appealability.” (Docket Entry No. 213). In that order, Judge Gadola granted a certificate of appealability with respect to the following two issues:

II. Petitioner was sentenced after *Apprendi* was decided, but before *Blakely* and *Booker* were decided. Does the fact that Petitioner advanced an *Apprendi* challenge to enhancements applied by the Court at sentencing now entitle him to a correction of his sentence?

V. Has Petitioner sufficiently demonstrated cause and prejudice so as to excuse his failure to advance his *Apprendi* claim on direct review?

(Docket Entry No. 213 at 3). Judge Gadola declined to issue a certificate of appealability with respect to the remaining three issues in Wheeler’s § 2255 Motion. (*Id.*).

On December 12, 2006, the Government filed the instant motion asking the Court to reconsider its decision to grant a certificate of appealability as to issues No. II and IV. (Docket Entry No. 214). Although the parties concluded briefing these issue as of June 11, 2007, for reasons unknown to this Court, Judge Gadola had not issued any ruling on the motion as of June 11, 2008.

On June 11, 2008, this action was reassigned to this Court. Given the considerable amount of time that this motion has been pending, and the fact that Judge Gadola presided over this case from its inception until June 11, 2008, this Court is very hesitant to disturb Judge Gadola’s ruling that a certificate of appealability should be issued with respect to issues No. II and IV.

Accordingly, IT IS ORDERED that the Government’s Motion for Reconsideration is DENIED.

IT IS SO ORDERED.

S/ Sean F. Cox
United States District Judge

Date: June 16, 2008

I hereby certify that on June 16, 2008, a copy of the foregoing document was served upon counsel of record by electronic means and by First Class Mail upon:

Audie Denver Wheeler

#26850-039

FCI Fort Dix

P. O. Box 2000

Fort Dix, NJ 08640

S/ J. Hernandez
Case Manager